

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY GOWENS,

Defendant-Appellant.

UNPUBLISHED

January 28, 2014

No. 311725

Allegan Circuit Court

LC No. 11-017497-FH

Before: HOEKSTRA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Mark Anthony Gowens appeals as of right his conviction of two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(c) (victim is physically helpless). The trial court sentenced defendant to 216 to 340 months' imprisonment for each conviction, to be served concurrently. We affirm.

In 2011, the victim returned to her home after going to the bank. At that time, her roommate, defendant, and his friend were all drinking beer in the living room. The victim went to her computer in the living room, and defendant attempted to get her to drink with the group and held her hand. The victim eventually went to lie down in her bedroom and fell asleep. She testified that she woke up at 2:00 a.m., and defendant was lying on top of her with his penis inserted into her vagina. She told defendant to stop, and he said "sorry" and walked out of the room. The victim fell back asleep, and at 4:30 a.m., she again awoke to find defendant lying on top of her with his penis inserted into her vagina. She pushed him off her. Defendant apologized and left the room again.

Defendant first argues that he was denied effective assistance of counsel when his attorney failed to request a cautionary instruction regarding a reference to defendant's felony conviction. At trial, the prosecution asked the victim's son, who was on probation, why he was not supposed to be around defendant. The son responded, "I'm thinking because he's got a felony." Defense counsel immediately objected, and defense counsel requested a bench conference. The court ruled that the question and answer were inadmissible. When the trial resumed, however, the court did not rule on the objection in front of the jury, and no cautionary instruction was given.

To establish ineffective assistance of counsel, a defendant first "must show that counsel's performance was deficient," *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001),

meaning that “counsel’s performance fell below an objective standard of reasonableness.” *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Second, “the defendant must show that the deficient performance prejudiced the defense,” and “[t]o demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Carbin*, 463 Mich at 600.

Counsel was objectively unreasonable for failing to request a cautionary instruction. Under MRE 404(b), evidence of prior convictions is generally inadmissible, and in the event the prosecution intends to introduce a conviction, it is required to provide “reasonable notice in advance of trial.” The prosecution did not give such notice and the trial court ruled correctly that the evidence was inadmissible. After the trial resumed, defense counsel did not ensure that the trial court instructed the jury to disregard the victim’s son’s comment, even though the court never ruled on the objection in front of the jury. This allowed the jury to consider the improper comment, and led to the reasonable conclusion that there was no problem with the answer elicited from the victim’s son.

Although defendant can establish that his counsel’s performance was objectively unreasonable, defendant has not established the existence of a reasonable probability that “but for counsel’s error, the result of the proceeding would have been different.” *Carbin*, 463 Mich at 600. Sufficient evidence existed for defendant to be convicted disregarding defendant’s felony reference. The victim testified that she awoke twice from sleeping and found defendant on top of her with his penis inserted into her vagina. Because she was asleep both times, she was physically helpless, and because defendant’s penis was inserted into her vagina both times, defendant committed two acts of sexual penetration. This is sufficient evidence for defendant to be convicted of two counts of third-degree CSC. MCL 750.520d(1)(c); *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998) (“It is a well-established rule that a jury may convict on the uncorroborated evidence of a CSC victim.”). Further, the jury heard testimony from an other-acts witness who testified that she was sexually assaulted in essentially the same manner as the victim in this case; thus, lending credence to the victim’s testimony. Contrary to defendant’s assertion, *People v Anderson*, 446 Mich 392, 407; 521 NW2d 538 (1994), is inapplicable because the testimony in question did not have an “obvious prejudicial and inculpatory nature.” Additionally, defendant’s actions, as described by the other-acts witness would constitute a felony and therefore, the brief vague reference by the victim’s son to defendant having a felony conviction was harmless. Thus, defendant has not established the existence of a reasonable probability that “but for counsel’s error, the result of the proceeding would have been different.” *Carbin*, 463 Mich at 600. Defendant simply has not met his burden of establishing ineffective assistance of counsel. *Id.*

Defendant next argues that the trial court misscored OV 11. We review the trial court’s factual determination for clear error and the facts must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

A trial court properly scores OV 11, criminal sexual penetration, at 25 points when “[o]ne criminal sexual penetration occurred.” 777.41(1)(b). A trial court cannot score “points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense,” and should score “all sexual penetrations of the victim by the offender arising out of the sentencing offense.” MCL 777.41(2)(a); MCL 777.41(2)(c). “Something that ‘aris[es] out of,’ or springs

from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen.” *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). Penetrations are properly scored when they “occur[] at the same place, under the same set of circumstances, and during the same course of conduct.” *Johnson*, 474 Mich at 100, citing *People v Mutchie*, 251 Mich App 273, 276; 650 NW2d 733 (2002). In this case, defendant was convicted of two counts of third-degree CSC. Scoring the second count of penetration was proper. MCL 777.41(2)(c), MCL 777.41(1)(b) and see *People v Cox*, 268 Mich App 440, 455-456; 709 NW2d 152 (2005).

We conclude that defendant’s second act of penetration “ar[ose] out of the sentencing offense,” MCL 777.41(2)(a), because approximately 2 to 2-1/2 hours after the first penetration, defendant committed the same act in the same location. The acts occurred within a relatively short time frame and the first act was halted only when the victim awoke. After waiting for her to fall asleep again, defendant perpetrated the second act. Thus, we find defendant’s second act of penetration had “a connective relationship, a cause and effect relationship, of more than an incidental sort” with the first act and “occurred at the same place, under the same set of circumstances, and during the same course of conduct” as the first act. *Johnson*, 474 Mich at 100-101.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Amy Ronayne Krause